Supreme Court, U.S.
FILED
SEP 07 2007
OFFICE OF THE CLERK

No. 07-328

In the

Supreme Court of the United States

DAVID H. HAYNES,

Petitioner,

v.

THE CITY OF CIRCLEVILLE

and,

WAYNE GRAY, individually and
in his official capacity as Chief of Police,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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September 7, 2007

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QUESTIONS PRESENTED

1. Whether criticism by a police K-9 officer that inadequate use-of-force training will result in public harm is protected speech under the First Amendment?

2. Whether a complaint of perceived "public harm" is entitled to greater protection under the First Amendment than a complaint of "public concern" and should it win favor under the balancing test of *Pickering v. Board of Education of Township High School District* 205, *Will County*, 391 U.S. 563 (1968) except for the most disruptive of circumstances?

3. Whether this Honorable Court intended to hold by its decision in *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006) that whistle blowing is always an official duty of every police officer thereby depriving him of First Amendment protections for disclosure of a dangerous use of force policy that will result in public harm?

4. Whether the First Amendment protects against retaliation for refusing to lie under oath?

5. Whether a Court of Appeals must remand a case in order to supplement the record when Supreme Court precedent intervenes?

PARTIES

Petitioner, David H. Haynes, was a City of Circleville police officer assigned to the canine unit. Respondent, City of Circleville, is the governmental authority over the police department and is the entity that actually fired Petitioner. Respondent, Wayne Gray, is the Chief of Police for the City of Circleville, Ohio who initiated Petitioner's firing.

TABLE OF CONTENTS

Questions Presented i

Parties ii

Table of Contents iii

Table of Authorities v

Petition for a Writ of Certiorari 1

Opinions Below 1

Jurisdiction 1

Precedent Involved 1

Constitutional and Statutory Provisions Involved 2

Statement of Case 3

Reasons for Allowance of the Writ 6

A. IT MUST BE DETERMINED THAT, IN THE HIERARCHY OF PROTECTED SPEECH, THE RIGHT TO WARN OF PHYSICAL DANGER IS PARAMOUNT 6

B. IT MUST BE CLARIFIED THAT THE OFFICIAL DUTY TO SPEAK STANDARD IN *GARCETTI V. CABELLOS* DOES NOT INCLUDE A WARNING OF HARM AS SUCH WARNING IS ALWAYS PROTECTED SPEECH 7

C. IT MUST BE ESTABLISHED THAT THE FIRST AMENDMENT PROTECTS AGAINST RETALIATION FOR REFUSING TO LIE UNDER UNDER OATH 9

D. IT MUST BE ESTABLISHED THAT INADEQUATE STATE REMEDIES DO NOT PROTECT FIRST AMENDMENT RIGHTS . . . 9

E. REMAND TO DEVELOP THE RECORD IS THE PROPER REMEDY WHEN SUPREME COURT PRECEDENT INTERVENES. 10

Conclusion 11

APPENDIX

Appendix A: Sixth Circuit Order denying rehearing (June 15, 2007) 1a

Appendix B: Sixth Circuit Opinion reversing and remanding (January 25, 2007) 3a

Appendix C: Opinion and Order of the Magistrate Judge in the United States District Court for the Southern District of Ohio, Eastern Division (December 1, 2005) 19a

TABLE OF AUTHORITIES

Cases

Garcetti v. Ceballos,
126 S. Ct. 1951 (2006) . . . . . passim

Smith v. Haning,
Unreported, C2-04-CV-1117, District Court, Southern District Ohio, Eastern Division 9

Constitutional and Statutory Provisions

First Amendment 2, 6, 9, 11

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 3

42 U.S.C. § 1983 . . . . . 1, 2

Rules

S. Ct. R. 13.1 1

PETITION FOR A WRIT OF CERTIORARI

Petitioner, David H. Haynes, respectfully petitions that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the District Court denying summary judgment to Defendants is not published but is reported at 2005 WL 3263313 and is reproduced in Petitioner's Appendix at p. 19a.

The opinion of the Court of Appeals reversing the District Court and granting summary judgment is reported at 774 F. 3d 357 and is reproduced in Petitioner's Appendix at p. 3a.

The order denying rehearing En Banc is not reported at but is reproduced in Petitioner's Appendix at p. 1a.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on January 25, 2007. A petition for rehearing En Banc was timely filed and denied on June 15, 2007. Pursuant to S. Ct. R. 13.1 this petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

PRECEDENT INVOLVED

This civil action was filed under 42 U.S.C. § 1983. At the time of the filing of the complaint and at the time summary

judgment for Defendants was denied, First Amendment precedent did not include "official duty" as a complete defense. This appeal involves the proper application of *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006) to deny a First Amendment claim without remand.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983. Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District

of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF CASE

Petitioner filed his civil rights action in Pickaway County Ohio Common Pleas Court. Because it was based upon a Federal question, it was properly moved to the United States District Court, Southern District of Ohio, Eastern Division, Columbus, Ohio. Respondents moved for summary judgment which was denied. Respondents appealed the issue of immunity pursuant to 28 U.S.C. § 1291. After Respondents' brief was filed and after Petitioner's response brief was filed but before Respondents' reply brief was filed, this Honorable Court decided *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006), which precedent was orally argued.

A three-judge panel Court of Appeals outright reversed in favor of Respondents and dismissed the entire action based upon the precedent of *Garcetti v. Ceballos, supra.*

A petition for En Banc rehearing was denied.

David H. Haynes has been a police officer with an unblemished record since 1987. His professionalism, knowledge, experience and dedication were not in question. When he joined the Circleville Police Department in 1991 he brought with him substantial police and K-9 training. He originated the idea to create a K-9 unit for Circleville. He prepared a feasibility study, obtained council approval, selected the dog to be purchased and trained it. He developed a written, detailed canine Standard Operating Procedure Manual (SOP). The Chief acknowledged that David Haynes' program was "above and beyond". David Haynes was, in his

own right, an expert by education, formal training and on-the-job training as to all aspects of a K-9 program.

The SOP Manual provided for formal in-service training which took place at a training facility in Dublin, Ohio. Notably, the SOP stated deployment of the K-9 dog to apprehend is a use of force subject to the general use of force policy in effect.

Due to budget issues in 2000, Chief Gray considered reducing canine training. Petitioner submitted a cost feasibility study which supported the program. He wrote a memo to the Chief that stated reduced training would adversely affect the program and it "will eventually catch up, and cost you more than you ever imagined". The memo prompted a study by Petitioner's superior, Lt Gaines, that concluded "whether we agree with these reasons or not, if we reduce training we could be faced, at some time in the future, with a claim that we failed to provide adequate training to the K-9 unit and be forced to have an expert witness to testify against the trainer whose services we have used for the last three and one-half years"(the formal Dublin trainer). There was no reduction in training.

Petitioner took a leave of absence to be a U.N. police officer in Kosovo. Upon his return he was immediately rehired without question. However, at rehire Petitioner extracted a promise from Chief Gray that training would not be reduced or compromised.

Chief Gray unilaterally reduced training, formal and informal. Petitioner sent Chief Gray a dire consequence memo (which Petitioner claims was the reason he was fired) which criticized that decision. The Chief replied in a dueling memo that he felt Petitioner's statements were threats (the

"you must testify" claim). Petitioner was fired. The termination letter referred specifically to the memorandum.

The City claimed various alleged reasons adequate to justify firing including refusal to perform decoy training, failure to respond to a call, failure to undergo a fitness-for-duty examination, a Christmas wrapped box containing his recalled K-9 uniforms and threats to prosecute as trespassers police messengers all of which were disputed and all of which were found by the trial court to be questions of fact in regard to insubordination. They are not relevant to a summary judgment dismissal.

Petitioner sued claiming that he was not a disgruntled employee complaining about work hours and conditions. He expressly stated he would follow the new training schedule. He was acutely aware that deployment of a K-9 is the employment of use of force equal to at least a night stick or a taser. An inadequately trained officer who deploys an inadequately trained K-9 will result in harm to a citizen. The dog must be constantly trained in real life situations. Self-training is inadvisable because the officer makes up the test and grades himself. The required props and drugs are not available. The unsuspecting public is the practice subject. Proper documentation and annual review of the dog's actions are crucial in determining if the dog needs additional training. It is absolutely essential to determine if the number of bites is justified. There is an acceptable bite ratio (total number of bites divided by the number of commands to bite). If training cannot be sustained, the dog must be taken out of service. Petitioner warned that an inadequately trained K-9, kept in service, would probably result in: (1) attacking without command, (2) failing to recall upon command, (3) failing to release upon command, (4) biting innocent bystanders, (5) false drug alerts with the result that he would be unable to

testify truthfully in court that the alert was valid for probable cause search purposes. Petitioner's concerns were not of recent origin, were not frivolous, but were studied and genuine. The focus of his speech was directed solely to protect the public from an inadequate use of force policy. He was willing to accept the fact that the dog would be taken out of service if funding was cut.

REASONS FOR ALLOWANCE OF THE WRIT

A. It must be determined that, in the hierarchy of protected speech, the right to warn of physical danger is paramount

This Court has never addressed the issue whether or not the hue and cry of a police officer that inadequate use of force training will result in harm to the public is protected by the First Amendment. Since it is not protected in the Sixth Circuit, this case should be accepted to establish the principal in a case of first impression.

This Court has hinted at, but not yet held, that speech about "public harm" is entitled to a greater protection under the First Amendment than speech about "public concern". Is not a warning that the K-9 on the street may bite you if it is not properly trained, more important for the public to know than a warning that public funds are being squandered or that racial discrimination is occurring? That hierarchy of concerns is not recognized in the Sixth Circuit. This case must be accepted and reversed to redress misplaced priorities.

B. It must be clarified that the official duty to speak standard in *Garcetti v. Ceballos* does not include a warning of harm as such warning is always protected speech.

The caveats of this court in *Garcetti v. Ceballos, supra*, have been ignored and disregarded. In that case "official duties" were undisputed. In this case they were never addressed and no opportunity to addr ss them was given. The panel decision's standard "on duty, in uniform, and engages in discussions with supervisors" and "communicating solely to his superior proves speech as a public employee" far exceeds what this Honorable Court propounded, "We reject, however, the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions". This excessively broad test was applied without any evidence in the record as to what speech duties the K-9 officer's duties entailed. If this precedent is permitted to stand, then the only people with knowledge of danger, and who should warn, will not do so for fear of retaliation for being insubordinate.

Innocent and unsuspecting John Q. Public has a right to know that a K-9 dog may bite. He has the right to know if armed police officers are trained when to shoot. He has a right to know if a police officer is properly trained to subdue a citizen with a taser without serious injury. This is not a case about remote, speculative, consequences. The "widespread costs of repressed dialogue" is best characterized by the factual consequences of this inadequate training policy, the criticism of which caused David H. Haynes to be fired. Inadequate training continued. Subsequently another Circleville K-9 officer, Ed Haning, decided to apprehend the town drunk on probation by releasing the K-9 from the cruiser with a command to apprehend. The drunk ran into a local bar. A 62 year old woman was dancing, minding her own

business. The dog failed to recall. The dog ran into the bar and bit the patron. It refused to release its clamped jaws upon command. The K-9 officer had to order the dog to attack him to end the situation. The patron suffered permanent nerve injury to her foot. The experience caused her mental suffering. To this date she fears dogs.

The Constitution of the United States was created to protect the rights of citizens. One such right is the right to liberty, which includes the right to be free from governmental harm. Unless the one in the know can raise a hue and cry, everyday citizens cannot question the propriety of keeping the dog on the street, they cannot protest to remove it from service and they cannot know to avoid its presence.

The Constitution should, like a doctor, do no harm. By allowing the alarm to be spread, the constitution rightfully muzzles the dog. If this decision stands, the Constitution wrongfully muzzles the police officer and denies "informed vibrant dialogue in a democratic society". If "in uniform, on the clock talking to the chief" is always official duty, then every police officer wears a muzzle at all times. Every citizen on the street or in a bar is at risk of being harmed by a poorly trained police officer.

Justices Souter, Stevens and Ginsburg, in their dissent in *Garcetti v. Ceballos, supra,* acknowledge Petitioner's claim that "threats to health and safety can outweigh the government's stake in the efficient implementation of policy". Petitioner believes the Court was making it clear that public safety cases are not governed by the decision. The proper holding must be reiterated and re-emphasized.

C. It must be established that the First Amendment protects against retaliation for refusing to lie under oath.

In addition to the warning of physical harm, David H. Haynes also claimed he was retaliated against because he said he would testify honestly in court that the dog was not adequately trained. It was this statement that Chief Gray perceived to be a "threat". Justices Souter, Stevens and Ginsburg in their dissent stated:

> upon remand, it will be open to the Court of Appeals to consider the application of *Pickering* to any retaliation shown for other statements; not all of those statements would have been made pursuant to official duties in any obvious sense, and the claim relating to trooper testimony in court must surely be analyzed independently to protect the integrity of the judicial process.

D. It must be established that inadequate State remedies do not protect First Amendment rights.

Petitioner's state whistleblower claim was also dismissed. The State statute was inadequate to protect such a valuable right. The deployment of a dog is subject to a qualified immunity defense and therefore the threat of a private suit is no deterrent to dangerous conduct, *Martha Smith v. Ed Haning et al.*, Unreported C2-04-CV-1117 District Court, Southern District Ohio, Eastern Division (negligent dog bite mentioned above not actionable). Related appeal dismissed 4/26/06, unreported Sixth Circuit No 06-3247.

E. Remand to develop the record is the proper remedy when Supreme Court precedent intervenes.

Finally, the Court entered the wrong remedy. It reversed and dismissed for defendants on all claims. When this Honorable Court decided *Garcetti v. Ceballos, supra,* it remanded the case for determination if some speech was outside the ambient of utterances pursuant to official duties. Petitioner had a right to be treated the same as Mr. Garcetti. Mr. Haynes was denied the right to supplement the record in regard to official duties. At least this claim should have survived dismissal as it was independent of the warning claim. The court should have remanded to determine the scope of David H. Haynes' official duties and if his speech was outside of his official duties–which it was.

CONCLUSION

Public employees with knowledge that government use of force policies are inadequate and will cause injury must be permitted to raise the hue and cry of public harm and safety or every citizen is at risk to be harmed from what they blissfully perceive to be safe actions. Disclosures about public safety deserve greater protection under the First Amendment than disclosures involving merely public concern. Any balancing test involving it must favor disclosure unless there is substantial disruption of the operation of the governmental office. In uniform, on the clock, talking to the boss, does not define "official duties". If it does, it is constitutionally too broad. There should never be a constitutional protection of one who requests another to lie in court.

Respectfully submitted,

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